U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 29 2006

EAC 03 252 54027

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks employment in "forestry technology." The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as an alien of exceptional ability, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that the director underestimated the impact of the beneficiary's work relative to the national interest. Counsel also asserts that, due to a procedural error, the matter should be remanded.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as an alien of exceptional ability in forestry. The sole issue in contention in the director's decision is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The record indicates that, after nearly two decades with Nigeria's Federal Department of Forestry, the petitioner has worked since 1997 at Hijen Lilac Ltd., "a firm of Consultant/Contracting Landscapers, City Park Developers and Wasteland Reclaimers." The initial submission established the petitioner's background, but included no explanation as to why it would be in the national interest to waive the job offer/labor certification requirement.

On January 3, 2005, the director received an updated version of the petitioner's resume, indicating that the petitioner worked as a landscape maintenance supervisor for LF Design in New Britain, Connecticut, from March 2004 to June 2004; and as a plant sales associate for Armstrong Garden Centers from October 2004 onward. There is no mention of forestry in the petitioner's descriptions of either position.

On March 17, 2005, the director issued a request for evidence, informing the petitioner: "The evidence you have submitted to date does not establish that the beneficiary qualifies for E1-1 classification as an 'alien with extraordinary ability' under section 203(b)(1)(A)" of the Act. In response, the petitioner correctly observes that he does not seek classification as an alien of extraordinary ability. The director did not subsequently issue a corrected request for evidence. Thus, the petitioner's objection went unheeded.

The petitioner states "a Forestry professional with 25 years of hands-on experience . . . is definitely a must-have asset to the United States of America." The petitioner's length of experience is a favorable factor in determining exceptional ability, pursuant to 8 C.F.R. § 204.5(k)(3)(ii)(B). Nevertheless, a showing of exceptional ability is not sufficient to qualify the petitioner for the national interest waiver. The plain wording of section 203(b)(2), quoted elsewhere in this decision, indicates that aliens of exceptional ability are

generally expected to have an offer of employment (including a labor certification). The job offer requirement is to be waived only when it is in the national interest to do so. Thus, the petitioner cannot establish that he qualifies for the waiver simply by asserting that he qualifies for classification as an alien of exceptional ability.

The petitioner submits a copy of a letter, dated February 11, 2005, informing the petitioner of his selection for the position of senior grounds supervisor at the University of California, San Diego (UCSD). Documents in the record show that UCSD posted the job announcement on June 9, 2004, over nine months after the petition's filing date of August 28, 2003. The job announcement states that UCSD seeks "an experienced Grounds Supervisor to supervise staff in all phases of grounds & landscape maintenance." The more detailed "Job Bulletin" accompanying the announcement confirms that the position involves supervision of UCSD's groundskeeping crew, maintenance of equipment, managing landscape construction, and so on.

The director denied the petition on May 3, 2005, acknowledging the intrinsic merit of forestry but finding "the proposed benefit does not appear to be national in scope, because the beneficiary is now to be employed at the University of California, San Diego as a Senior Grounds Supervisor. Based on this permanent offer of employment, it appears that his expertise will now be benefiting primarily his employer, rather than the nation as a whole." The director also found that the petitioner had failed to show that the labor certification process would be contrary to the national interest in this instance.

On appeal, counsel states:

> Beneficiary's occupation was incorrectly found not to be national in scope. At the time the petition was filed, he brought experience of national scope projects in Nigeria during his 18 years of experience with the national government there. In his current position as a Senior Grounds Supervisor, Beneficiary has responsibilities to maintain and improve a significant national environmental resource. . . .
>
> The two campuses of UCSD include fragile coastal areas subject to erosion and an urban forest of 250,000 trees on 1200 acres. Proper landscape design, maintenance and protection of this environment is linked to the national environment. The location near the international border with Mexico also has cross-border ecological impact. Innovative projects identified by the beneficiary for his employer will have national benefit. His visionary proposal to develop the campus as an arboretum by applying advanced principles of forestry to achieve a sustainable and renewable resource will have both environmental and economic benefits for the nation.

Counsel's claims regarding the petitioner's specific duties and projects at UCSD are completely unsubstantiated. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains nothing to show that the petitioner is responsible for large-scale forestry projects at UCSD. Here is the complete job description from the UCSD Job Bulletin in the record:

> Plan, coordinate and supervise assigned staff in all phases of grounds and landscape operations and maintenance including: turf management, pest control, tree maintenance; irrigation systems (manual and semi-automated); landscape construction & installation; maintenance of soft and hard scapes; and the maintenance/repair of heavy equipment and tools. Meet with internal and external customers to coordinate regular maintenance and initiate special requests. Act as technical advisor and project manager for new landscape construction acceptance in assigned area. Assign work to groundskeepers and conduct weekly inspections of areas to maintain grounds and landscape standards and correct potential safety hazards. Manage annual budget allocation and expenditures. Maintain equipment and tools inventory.

The complete list of qualifications for the position is as follows:

- Broad knowledge and experience in grounds and landscape maintenance and operations. Ability to supervise and coordinate the work of others and maintain solid productivity and high morale.
- Ability to manage and administer a maintenance area including budget, planning, staffing and technical operations. Extensive experience working in a service-oriented environment and nurturing customer relationships through proactive service skills.
- Knowledge of turf grasses or combinations of turf grasses including growth characteristics, irrigation requirements, fertilization including trace minerals and diagnosis and treatment of infestation by noxious diseases and pests.
- Specific knowledge of shrubs, trees and ground covers including growth characteristics, irrigation requirements, fertilization including trace minerals and diagnosis and treatment of infestation by noxious diseases and pests.
- Knowledge of soil types and conditions and the ability to perform and/or interpret soil analysis.
- Ability to read blueprints and specifications and to calculate material requirements taken from blueprints. Ability to effectively communicate orally, in writing and electronically.

The above description and qualifications, in which the word "forestry" never appears, indicate that the petitioner's duties have more in common with campus groundskeeping than with environmental projects on a nationally significant scale. This is consistent with the job title of "Senior Grounds Supervisor."

The above observations aside, the job offer from UCSD did not exist at the time of filing and therefore cannot establish eligibility. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition, and subsequent developments cannot cause a previously ineligible beneficiary to become eligible in the context of the same filing.

Counsel admits that "this petition was filed before the beneficiary took his current position, and is therefore based on the fact that his 'past record justifies projections of future benefit to the national interest.' His past record consists of 25 years of experience as a forester contributing to the improvement of the environment in Nigeria."

The "national scope" issue relates to the occupation overall, rather than to the alien in particular. While groundskeeping is not national in scope, forestry can, in principle, be national in scope. To this extent, it is indeed relevant to consider the petitioner's past work in forestry. At the same time, we cannot ignore that the petitioner is no longer an official of a government forestry program. Rather, he supervises a university's campus groundskeepers and landscapers. Landscaping and forestry are distinct, if arguably related, fields of endeavor. The petitioner has not shown that supervision of a campus groundskeeping crew qualifies as forestry. Whatever his experience in forestry in Nigeria, the record does not demonstrate that the petitioner has had any opportunity to engage in forestry on a nationally significant scale, or that any U.S. entity has expressed any interest in the petitioner's services in the specialty of forestry. An argument could be made that, while the petitioner may be an alien of exceptional ability in the field of forestry, he no longer works in that field and therefore his eligibility for the classification is in doubt.

Based on the above discussion, it is clear that the petitioner has not, thus far, met his burden of proof regarding eligibility for the national interest waiver. Counsel's initial arguments on appeal rest largely on unsubstantiated claims regarding work that did not commence until well after the filing date.

Counsel had indicated that a brief would follow within thirty days of the filing of the appeal. In a timely supplement to the appeal, however, counsel states: "In lieu of full briefing, we are herewith requesting Remand of the Decision on Form I-140 . . . because of procedural error by the Director that hampered full development of the record for adjudication of the original petition." Specifically, counsel repeats the petitioner's prior objection that the only request for evidence issued by the director dealt with the wrong classification, and therefore the petitioner was left to guess as to the nature of the documentation that would more strongly support his petition.

The record, as it now stands, does not support a finding of eligibility. We concur, however, with counsel's assertion that the director's issuance of an incorrect request for evidence prejudiced the petitioner's ability to submit a meaningful response prior to the issuance of the decision. The director must, therefore, issue a proper request for evidence that is relevant to the classification sought and which allows the petitioner a meaningful opportunity to supplement the record prior to the issuance of a new decision.

We stress here that our concurrence with counsel's legal argument *vis-à-vis* the request for evidence does not, in any way, imply our concurrence with any other factual claim set forth in counsel's appeal statement.

Therefore, this matter will be remanded. The director must issue a request for evidence and allow the petitioner 12 weeks to respond, pursuant to 8 C.F.R. § 103.2(b)(8). As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: **The director's decision is withdrawn. The petition is remanded to the director for further action** in accordance with the foregoing and entry of a new decision which, regardless of the outcome, is to be certified to the Administrative Appeals Office for review.